Supreme Court, U.S.
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In the Supreme Court

of the United States

OCTOBER TERM, 1971

No. 71-45

RONALD EARLE MARTIN,

Petitioner,

v.

PACIFIC NORTHWEST BELL TELEPHONE COMPANY, a Washington corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 27, 1971.

OPINION BELOW

Ronald Earle Martin, Plaintiff-Appellant, v. Pacific Northwest Bell Telephone Company, a Washing-

ton Corporation, Defendant-Appellee, No. 26073, ____F.2d____ (9th Cir. 1971). There was no opinion in the United States District Court for the District of Oregon.

JURISDICTION

Judgment of the Court of Appeals for the Ninth Circuit, affirming the Judgment of the United States District Court for the District of Oregon, was entered on April 27, 1971. Jurisdiction rests in this Court by reason of Tit. 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

(1) Is the action of a State-regulated public utility in discharging an employee on account of his refusal to violate his religious beliefs and practices as a Seventh Day Adventist subject to an action for damages under the provisions of the Act of April 20, 1871, C. 22, § 1, 17 Stat. 13, Tit. 42 U.S.C. § 1983?

(2) Is Respondent's character as a State-created, protected and regulated public utility monopoly, so entwined with the interests of the State that its deprivation of Petitioner's First Amendment right to the free exercise of his religion was State action within the meaning of Tit. 42 U.S.C. § 1983?

STATUTE INVOLVED

Tit. 42 U.S.C. § 1983:

"Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent brought an action under Tit. 42 U.S.C. § 1983 for damages by reason of Respondent's having discharged him for refusing to work on Saturday contrary to the tenets of his faith as a Seventh Day Adventist (R. 1-3)[1]. A motion to dismiss the complaint under Rule 12 (b) (6) F.R.C.P. for failure to state an enforceable claim for relief was allowed (R. 4, 15). Petitioner moved under Rule 15 (a) F.R.C.P. for leave to file an amended complaint, which was denied (R. 16; 18-21; 40). A judgment of dismissal was entered (R. 41), from which an appeal was taken to the Court of Appeals for the Ninth Circuit (R. 43). The Court of Appeals affirmed the judgment of the trial court Per Curiam, holding that Respondent's dismissal of Petitioner was not "State action."

The amended complaint alleged facts summarized as follows:

On June 18, 1965, Petitioner had been employed

[1] Record citations are to the record in the proceedings in the Ninth Circuit.

by Respondent for seventeen and one-half years, and his training and experience qualified him only to do work of Respondent's type, in particular as an "office equipment maintenance man." Respondent did business in Tillamook County, Oregon, where Petitioner worked, as a regulated public utility subject to specific provisions of State law, and as such it enjoyed a State granted and protected monopoly in that area, in addition to other rights and privileges given only to public utilities by state law.

In January, 1965, Petitioner was baptized as a member of the Seventh Day Adventist Church, which forbids its members from gainful employment on Saturday. Petitioner notified Respondent that he would not work on Saturdays, and for several months Respondent acquiesced in that refusal. When Petitioner refused an order to work on Saturday on June 18, 1965, he was immediately and summarily discharged. He demanded, but never received, back wages, restoration of employment, proper dismissal documents or severance pay.

REASONS WHY PETITION FOR CERTIORARI SHOULD BE GRANTED

1. An imporant Federal question should be settled by this Court.

The Court of Appeals for the Ninth Circuit decided an important Federal question in a way which has not been, but should be, settled by this Court, to-wit: The Court of Appeals decided that even

though Respondent enjoys an economic monopoly which is protected and regulated by the State, its actions in depriving Respondent of his First Amendment right to the free exercise of religion was purely a matter of internal management, not related to Respondent's public service functions in which the State has an interest.

2. Petitioner should have been permitted to amend his complaint to show the facts of state action.

Despite the rule that a plaintiff in a § 1983 case should be given every opportunity to amend his complaint to plead the requisite facts to show a violation of the statute (*Marshall v. Sawyer*, 301 F.2d 639, 647 (9th Cir. 1962)), Petitioner was prohibited from filing an amended complaint which alleged the following facts relating to Respondent's relationship to the State of Oregon, which show that actions by Respondent constituted State action.:

(a) Respondent is a public utility under Oregon State law, and subject to the regulatory powers of the State's Public Utility Commissioner.

(b) Respondent enjoys the benefit of allocated service areas under Oregon law, which gives it a protected monopoly.

(c) Respondent enjoys guaranteed rates for services and protected rates of return on its investment.

(d) Respondent enjoys the exercise of governmental rights not available to private persons or

corporations other than public utilities under Oregon law, specifically including use of public property for its facilities and services and the privilege of exercising the State's power of eminent domain.

(e) Petitioner's training and experience qualified him only to work in operations such as those of the monopoly Respondent.

3. The amended complaint sufficiently alleged state action.

A claim under § 1983 must allege facts which show that the defendant (1) acting under color of any statute, ordinance, regulation, custom or usage of any State or Territory, (2) deprived plaintiff "of any rights, privileges or immunities secured by the Constitution and laws of the United States." Conduct is State action within the meaning of the statute if the actor was sufficiently clothed with the authority of the state. *Monroe v. Pape*, 365 U.S. 167 (1961); *Cohen v. Norris*, 300 F.2d 24, (9th Cir. 1962). The amended complaint sufficiently alleges that Respondent deprived Petitioner of his First Amendment right to the free exercise of his religion, and denied him Due Process of Law and Equal Protection of the Laws. The amended complaint also contained sufficient allegations of Respondent's character as a State-created, protected and regulated monopoly to form a foundation for a conclusion that Respondent's activities and interests are so entwined with the interests of the State that its action is "State action" within the ambit of § 1983.

4. There was religious discrimination.

A Seventh Day Adventist's religious beliefs and practices are protected under the First Amendment and under the Due Process and Equal Protection clauses of the Fourteenth Amendment against discriminatory actions. *Sherbert v. Verner*, 374 U.S. 398 (1963). A privately owned and operated business is not free to discriminate against the exercise of First Amendment and Fourteenth Amendment rights where the business' operations are essentially public functions, subject to state regulation, particularly where the state affords specific special protections and privileges to the business. *Marsh v. Alabama*, 326 U.S. 501 (1946). Where the state is so "entwined" in the operations of an otherwise private business or institution that the business or institution is essentially public in character, it remains subject to the restraints of the Fourteenth Amendment which § 1983 was passed to enforce. That public character must be determined by judging the relationship between the institution, its services rendered and the government. *Evans v. Newton*, 382 U.S. 296 (1966). Where that character exists, private property cannot be operated without being subject to the Fourteenth Amendment unless and until the owner gives up completely its relationship with the State and the consequent special privileges and protections that relationship affords. *Evans v. Abney*, 396 U.S. 435 (1970). What the State cannot do directly is prevented by § 1983 from being done indirectly by a company that enjoys a special relationship with the State.

5. The test for "state action" was satisfied by the relationships between the respondent public utility and the State of Oregon.

The controlling test for defining "State action" is whether there is a sufficiently close relationship between the State and the actor so that it can fairly be said that the latter's actions are sufficiently charged with public interest to be subject to the Fourteenth Amendment and the statute passed for its enforcement. Thus, the mere fact that a corporation is a public utility, or the fact that it thereby enjoys a government protected monopoly may not be themselves be enough to subject the actions of the corporation to § 1983; but when there is added to those facts the regulatory supervision of a State agency, the requisite relationship may be said to exist. *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 (1952). Where there is a position of interdependence between the State and the allegedly private business, involving special State participation, protection and privileges, apparently private action is colorably action by or under the authority of the State. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). It is not necessary that the corporation charged with the unconstitutional discrimination actually be an instrumentality of the government; it is sufficient if the State and the corporation fit into a pattern of activities, obligations and responsibilities so that there is a position of interdependence. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724-726 (1961).

Consistent with the standards established by *Burton, supra,* and *Pollak, supra,* Petitioner sought to file an amended complaint to set out with specificity the relationship between the State and the Respondent. The elements of that relationship are:

(a) Defendant is a public utility within the definition of ORS 757.005 and is therefore subject to the regulatory powers of the State of Oregon through the Public Utility Commission.

(b) The corporation is subject to the provisions of ORS Chapters 756, 757 and 758, which give the Public Utility Commissioner extensive and far reaching powers extending to every aspect of defendant's business;

(c) Under the Oregon system of allotted service areas (instead of the traditional franchise or public convenience and necessity systems) Respondent exercises a monopoly in the area where Petitioner was employed. See ORS 757.605 to ORS 757.685.

(d) As a specialized employee, Petitioner cannot exercise his training and experience for any other employer.

(e) The State of Oregon protects, regulates and effectively guarantees the Respondent in respect to its rates for services and its rates of return on investments and facilities: ORS 757.020, 757.045, 757.105, 757.140-.150, 757.205-.245.

(f) Respondent is entitled under ORS 758.010

to use public property for its operations and facilities, and is entitled to exercise the State's power of condemnation of private property for its facilities under ORS 772.205 - .220.

Taken all together, this list is pursuasive that the relationship between the State of Oregon and the Respondent is such that the two are as "entwined" as they could possibly be, short of the State's furnishing telephone service itself.

6. The "State action" doctrine needs further clarification.

It was anticipated that this Court's opinion in *Dewey* v. *Reynolds Metals Company*, — U.S. —, 39 L.W. 3526 (June 1, 1971), would be forthcoming before the decision of the Court of Appeals in this case, and that it would aid in the Court of Appeals' decision. The Court of Appeals did not wait for that decision, and the affirmance in *Dewey* by equally divided vote furnished no guidance. It is counsel's belief that the parameters of the State action doctrine were involved in the *Dewey* case, and they remain uncertain and indistinct. An opinion in this case by the Supreme Court of the United States would give a much needed definition to the doctrine.

7. The Court of Appeals erroneously applied existing case law.

The Court of Appeals rested its decision on two clearly distinguishable cases: *Kadlec* v. *Illinois Bell Tel Co.*, 407 F.2d 624 (7th Cir. 1969),

Cert. denied 396 U.S. 846, and *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968).

(a) *Kadlec* was an attempt by a telephone company customer to make a civil rights case out of a mere termination of service situation. Plaintiff had apparently violated the regulations limiting the use of a particular type of service offered by the telephone company. The termination was consistent with the filed regulations of the company. The Court there found that "the mere filing of these regulations" did not satisfy the requirements of § 1983 in the absence of a showing of "greater state involvement or control than is alleged in this case." Judge Kerner, in his special *concurrence* pointed out that, in fact, the case presented a pleading problem, and he listed a number of factors which, had they been alleged, might show a sufficient nexus or inter-dependence between the state and the company to make "some of its actions under color of law." The petitioner has gone much further than the plaintiff in *Kadlec* to show the intimacy of the utility and the State.

(b) *Powe* involved simply a state aided institution where there was not alleged and shown to be state control over the actual or potential activities of the institution itself. The Court, in that case, held that "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff, but with the activity that caused the injury." Petitioner has attempted to plead sufficient facts to show that the public utility has such a

relationship with the State that the State has the power, privilege and authority, whether exercised or not, to regulate and control, not only the utility's public service functions, but its "internal management."

Petitioner was discharged because he refused to violate his religious beliefs and practices. Respondent claims an immunity from § 1983 because it is a "private corporation." Respondent enjoys a complexity of rights, privileges and immunities accorded *only* by reason of its very special relationship to the state. It has not foresworn and would not foreswear those special relationships, but it would deny respondent his constitutional rights.

CONCLUSION

This Court should allow this Petition for Writ of Certiorari in order for there to be a determination whether respondent should be permitted to cloak its essentially public nature and consequent public activities under the guise of private ownership to the detriment of a long-time employee who seeks the protection of his Constitution and the statute enacted pursuant thereto.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD EARLE MARTIN, *Plaintiff-Appellant,*
v.
PACIFIC NORTHWEST BELL TELEPHONE COMPANY, a Washington corporation, *Defendant-Appellee.* — No. 26,073

[April 27, 1971]

Appeal from the United States District Court for the District of Oregon

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Before: KOELSCH, CARTER and WRIGHT, Circuit Judges.

PER CURIAM:

The principal question on this appeal is whether the well pleaded allegations in plaintiff's proposed amended complaint show that defendant, in discharging plaintiff from its employment, was acting "under color of" state authority, within the meaning of 42 U.S.C. § 1983.[1]

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[1] "§ 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979."

Plaintiff, a long time employee of defendant Pacific Bell Telephone, was fired when he refused to work on Saturdays, following his baptism as a Seventh Day Adventist. A tenet of that Church forbids members to engage in gainful employment on Saturdays. Invoking the Civil Rights Act of 1871, plaintiff brought this action against Pacific Bell seeking reinstatement to his job, an accommodation of his work schedule with his religious obligations, and money damages. The gravamen of his complaint is that Pacific Bell, by discharging him, thereby prohibited him from the free exercise of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States and, in addition, thereby violated Section 1983.

Plaintiff alleged in his complaint that Pacific Bell is a Washington corporation authorized to do and doing business in Oregon as a public utility and exercising the privileges of a state protected monopoly.

Pacific Bell, responding by motion to dismiss under Rule 12(b)(6) F.R. Civ. P., urged in substance that these allegations did not show action taken "under color of any state law" and that therefore plaintiff had failed to state a federally enforceable claim. The District Court, apparently agreeing, granted the motion.

Plaintiff then tendered an amended complaint. This pleading was similar to the original, except for the detailed specification of the matters that plaintiff relied upon to show the requisite state action. Plain-

tiff's allegations in effect were that the State of Oregon granted Pacific Bell, as a public utility, the power of eminent domain and the right to construct and maintain without charges telephone lines along public thoroughfares; further that the State, through its Public Utilities Commissioner, regulated Pacific Bell's rates for service and prescribed the geographical area in which Pacific Bell could exercise its protected monopoly.

The district court, however, concluding that the proposed amendments would add nothing of substance to the asserted claims, denied filing of the amended complaint and entered judgment dismissing the action.

The First Amendment expressly restrains the Congress of the United States from enacting any law which abridges certain fundamental rights, including freedom of religion. The due process clause of the Fourteenth Amendment has been interpreted to impose the restrictions of the First Amendment upon the several states and their political subdivisions. *Fiske* v. *Kansas*, 274 U.S. 380 (1927); but is equally well settled that the prohibitions of the Fourteenth Amendment apply only to state action and not to "individual invasion of individual rights." Civil Rights Cases, 109 U.S. 3 (1883). It follows that the violation of such constitutional rights is actionable, under federal law, only when committed by one who is "clothed with the authority of the state and . . . purporting to act thereunder." *Marshall* v. *Sawyer*, 301 F.2d 639 (9th Cir. 1962).

The fact that a private corporation, such as Pacific Bell, enjoys an economic monopoly which is protected and regulated by the state does not necessarily bring its every act within the purview of Section 1983. *Kadlec* v. *Illinois Bell Tel. Co.*, 407 F.2d 624 (7th Cir. 1969), Cert. denied 396 U.S. 846, for, as well stated in *Powe* v. *Miles*, 407 F.2d 73, 81 (2nd Cir. 1968), "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury." In this case, plaintiff's allegations at most concern Pacific Bell's public service functions; they neither show nor tend to show an intrusion by the State into matters of Pacific Bell's internal management.

Plaintiff's discharge, of course, comes under the latter head.

Affirmed.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The record presents no federal question which will govern other cases, but merely a unique pleading matter of interest only to the parties. There is no conflict in the opinions of lower federal courts as to applicable legal standards	2
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OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 441 F.2d 1116.

STATEMENT OF THE CASE

Petitioner's statement that the Court of Appeals for the Ninth Circuit affirmed the district court's